Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1037

In the Matter of

SOUTHWEST RESTAURANT SERVICES, INC., an Arizona corporation, dba PINNACLE PEAK PATIO,

---

STOCKTON & HING,

Petitioner,

v.

JOHN EVANS, Trustee of SOUTHWEST RESTAURANT SYSTEMS, INC., and HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Statutes Involved	
Arizona Revised Statutes Section 44-3104	21
Section 44-3126	21
Reasons for Granting the Writ	22
Conclusion	37
Certificate of Service	38
Index to Appendix	
Appendix	

TABLE OF AUTHORITIES

Cases	Page
City of Glendale v. Arizona Savings & Loan Association, in Receivership, 2 Ariz.App. 379, 409 P.2d 299 (1965)	29
Cleveland Chair Company v. United States, 557 F.2d 244 (Court of Claims 1977)	30
Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C.App. 242, 178 S.E.2d 124 (1970)	27
In Re King Furniture City, Inc., 240 F.Supp. 453 (Ark. 1965)	27
In Re Lickie Freeburn Coal Company, 405 F.2d 1043 (6th Cir. 1969)	27
Kalmanoff v. Weitz, 8 Ariz.App. 177, 444 P.2d 728 (1968)	29
O'Dell v. Kunkel's, Inc., 581 P.2d 878 (Okla. 1978)	26,32
Savic v. Kramlich, 12 P.2d 260 (Idaho 1932)	32
Whitmer v. Kleppe, 469 F.2d 1245 (4th Cir. 1972)	29

Statutes	Page
Arizona Revised Statutes	
Sec. 44-3104, U.C.C. Sec. 9-104	21,22,27,28,31
Sec. 44-3126, U.C.C. Sec. 9-305	21,23,25
Sec. 44-3147(B), U.C.C. Sec. 9-501(4)	25
11 U.S.C. Sec. 501	3
28 U.S.C. Sec. 1254(1)	2

Other Authorities	
1 Bender, U.C.C.S., Secured Transactions Sec. 5.07, page 394	28

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Stockton & Hing, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 5, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix "A" attached hereto. The opinions of the District Court for the District of Arizona are attached hereto as Appendices "B" and "C".

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 5, 1979. A timely Petition for Rehearing was denied on October 4, 1979, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is envoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether a Security Agreement Relating to Corporate Stock Created by the Agreement of a Client and His Attorney and Perfected by Possession of the Stock and a Stock Power is a Valid and Enforceable U.C.C. Lien as Opposed to a Common-Law Retaining Lien.

STATEMENT OF THE CASE

The statement of the case is set forth in two parts containing the separate facts of two causes which were consolidated in the United States Court of Appeals for the Ninth Circuit in Cause Nos. Ca 77-3613 and CA 77-3229. These two cases for which this Petition for Writ of Certiorari are being sought are related cases since they both involve claims of security interests on stock in the same corporation but which are owned by two different individuals. The stock was in a corporation known as Southwest Restaurant Systems, Inc., which corporation became subject to a reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. § 501,

et seq., and which proceedings have given rise to both of the appeals to the Ninth Circuit.

CAUSE NO. CA 77-3613

I

Jurisdiction

This cause originated from the United States District Court for the District of Arizona in a bankruptcy proceeding. The District Court had jurisdiction pursuant to the Bankruptcy Act and the Bankruptcy Rules, Rule 801, et seq.

II

Prior Proceedings

An order of the Bankruptcy Court, on May 6, 1977, denied the objections to interim distribution to stockholders filed by Stockton & Hing. The objection to the interim distribution to stockholders was made by Stockton & Hing asserting that any distribution to stockholders should reserve and pay to Stockton & Hing two-thirds (2/3) of said distribution because of liens which

Stockton & Hing have on the stock interests of John Greer, Jr. and Charles G. Harris in the debtor corporation. The order of the Bankruptcy Court on May 6, 1977, was affirmed by the United States District Court for the District of Arizona, and a judgment filed August 19, 1977 and Memorandum and Order filed August 17, 1977 (Appendix "B"). The Ninth Circuit Court of Appeals affirmed the judgment on September 5, 1979, and this Petition is a result of said judgment of the Court of Appeals.

III

Statement of Facts

1. Employment of Stockton & Hing.

Charles G. Harris and John H. Greer, Jr. (hereinafter referred to as "Harris" and "Greer") were each one-third (1/3) shareholders of the debtor corporation, each owning 30,667 shares of said corporation. Both individuals have filed individual bankruptcies, Greer in the District of Arizona, No. B-76-1840, and Harris in the District Court of Arizona, No. B-75-320. Portions of said

proceedings are included in the Record on Appeal before the Ninth Circuit.

In the summer of 1972, Messrs. Greer and Harris first engaged the services of the law firm of Stockton & Hing with respect to an arbitration hearing in which a valuation was to be placed on the stock of Southwest Restaurant Systems, Inc. and other restaurant corporations in which said parties had interests. After the arbitration hearing, the law firm of Stockton & Hing was paid in full for services with respect to said arbitration proceeding.

Subsequently, in May of 1973, Messrs. Greer and Harris retained the law firm of Stockton & Hing to represent said parties with respect to legal proceedings in which the said parties were involved, pending in the Superior Court of Maricopa County, Cause No. C 249999. Numerous Court proceedings, depositions and an extensive order to show cause were heard in the summer of 1973. Trial of the case commenced on or about September 10, 1973, before a jury. At the time of

the commencement of the trial in said case, Greer and Harris were indebted to the law firm of Stockton & Hing in the approximate amount of Ten Thousand Dollars ($10,000.00).

2. Lien Granted for Attorneys' Fees.

At the time of the commencement of said trial, Greer and Harris were instructed by Mr. Robert Ong Hing to bring their stock certificates in Southwest Restaurant Systems, Inc., an Arizona corporation, and deposit the same with the law firm of Stockton & Hing, as security for the payment of attorneys' fees which said parties jointly and severally owed to the law firm of Stockton & Hing within ten (10) days after the commencement of said trial, along with signed stock powers. The records of the law firm of Stockton & Hing indicate that Greer and Harris, on September 15, 1973, were indebted to the law firm of Stockton & Hing in the sum of Twelve Thousand Sixty Five Dollars ($12,065.00).

At the time the debtor corporation filed for reorganization, Messrs. Greer and Harris

owed Stockton & Hing the sum of Forty Eight Thousand Eight Hundred Forty Three and 10/100 Dollars ($48,843.10), and at the time Harris filed bankruptcy, the sum of Fifty Seven Thousand Two Hundred Eleven and 75/100 Dollars ($57,211.75) was owed, and at the time Greer filed bankruptcy, the sum of Sixty Seven Thousand One Hundred Eighty and 75/100 Dollars ($67,180.75) was owed to Stockton & Hing. Since the filing of these bankruptcies, additional time and effort has been spent in pursuing and litigating the security interests which Stockton & Hing have on Greer and Harris stock and those stock interests are continuing to be charged for the time and effort expended in the collection of these fees.

3. Prior Court Proceedings

On May 14, 1975, the Honorable Edward E. David, Judge of the Bankruptcy Court, acting as Special Master, reported Findings of Fact which were subsequently adopted on May 27, 1975, by the Honorable Walter E. Craig, determining stock ownership of the debtor corporation. Judge Craig's Order was entered without prejudice

to the lien rights, if any, of any of the respondents, which included Stockton & Hing. Stockton & Hing, therefore, believed that their security interests were fully protected.

In the matter of the Harris bankruptcy, the issue of the superiority of the Stockton & Hing lien as to a garnishment by Harvey R. McElhanon against Harris was determined by the United States District Court in an appeal from the Bankruptcy Court in favor of Stockton & Hing. The opinion determined that Stockton & Hing had a superior, perfected lien on said stocks, Appendix "C".

Long after the granting of the security interest in the stock and delivery of the stock and stock powers to Stockton & Hing, (September 1973), judgments were rendered against Greer (December 12, 1975 for $350,000.00) and Harris (March 23, 1977 for $455,951.36) in favor of the debtor corporation herein by the Bankruptcy Court. Also, after the granting of the security interest, but prior to the above judgments, the

Bankruptcy Court approved a plan of reorganization for the debtor corporation by its Order of October 14, 1975, which at page 5, paragraph 4, provides that liens on stock interests would be preserved.

> 4. "All claims, mortgages, pledges, liens, charges, assessments, employment agreements, claims for salaries, wages or other forms of compensation, and all accounts payable incurred by the Trustee . . . , and all claims arising from stock ownership and <u>liens on stockholder interest that existed prior to cancellation of said stock</u>, shall, if valid and enforceable against the Trustee, all attach . . ., to the proceeds of said escrow and other assets in the hands of the Trustee . . . " (Emphasis added)

The Order at page 6, paragraph 5, provided that after payment of claims and administrative costs, any sums remaining would be distributed to stockholders, pro rata, less any amounts found

due to the corporation from the stockholders by reason of loans, indebtedness or liability to the corporation.

5. <u>Court Action Which Resulted in this Petition</u>.

In the Findings of Fact and Conclusions of Law Regarding Trustee's Interim Report, Trustee's and Attorney's Application for Interim Fees and Petition for Interim Distribution to Stockholders and the Order adopting said Findings of Fact and Conclusions entered May 6, 1977, (which Order is the subject of this proceeding) by the Honorable Edward E. Davis, Bankruptcy Judge, the Court determined in Finding No. 20 as follows:

> "The Court further finds that, based on the Plan of Reorganization approved and confirmed herein, and considering the liabilities of the stockholders to the corporation, that the only stockholders entitled to share in the distribution of funds to stockholders in this estate are Harvey McElhanon and Doreen McElhanon,

his wife, and William Jenkins and Rachel Jenkins, his wife, said distributions to be made to said stockholders on a pro rata basis, and based upon the percent of stock owned by them in the above named corporation, as previously determined herein."

This finding and the order based upon that finding were a denial of the request by Stockton & Hing to receive two-thirds (2/3) of the distribution to shareholders based on their lien rights and security interest in the Greer and Harris stock interests, which rights were preserved by the Plan of Reorganization quoted immediately above.

5. Recognition of Liens by Trustees and Court.

Since the entering of the above findings, the Trustee in the Greer bankruptcy has determined that Stockton & Hing have a valid lien on the stock owned by Greer in Southwest Restaurant Systems, Inc. and has disclaimed any title thereto and has abandoned the property to Stockton & Hing in satisfaction of the debt.

I

Jurisdiction

This cause also originated from the United States District Court for the District of Arizona, in a bankruptcy proceeding. The District Court had jurisdiction pursuant to the Bankruptcy Act and the Bankruptcy Rules, Rule 801, et seq.

II

Prior Proceedings

The bankrupt, Charles Gilbert Harris (and hereinafter "Harris") filed a Petition for Bankruptcy on February 14, 1975. On May 16, 1975, a Complaint was filed by Harvey R. and Doreen T. McElhanon to recover property and determine the validity, priority and extent of lien. Thereafter, plaintiffs McElhanons, filed an Amended Complaint on June 3, 1975. This Amended Complaint was filed against the Receiver, Wallace Perry and Robert Ong Hing and Henderson Stockton and the law firm of Stockton & Hing. On June 25, 1975, Stockton & Hing answered the Amended Complaint

and filed a Counterclaim and Crossclaim for attorneys' fees asserting priority of a security interest and lien on Southwest Restaurant Systems, Inc.'s stock certificates owned by the bankrupt Harris which is a part of the bankrupt estate. The Bankruptcy Court granted summary judgment for McElhanons, determining that their lien was superior.

Stockton & Hing appealed the judgment of the Bankruptcy Judge to the United States District Court for the District of Arizona. In an opinion filed June 30, 1977 (Appendix "C"), the Honorable William P. Copple reversed the judgment of the Bankruptcy Judge which had given McElhanons a "first and superior lien" against the shares of stock owned by Harris.

McElhanons appealed from the judgment of the United States District Court to the Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the judgment of the District Court in its opinion attached as Appendix "A".

Both Cause No. 77-3613 and No. 77-3229 were

consolidated and a single opinion was rendered and, therefore, this single Petition for Writ of Certiorari is filed regarding both of those cases.

III

Statement of Facts

The only additional facts relating to the Harris stock which have not been set forth above are as follows:

1. Transaction Involving Harris' stock.

Certificate No. 2 in the debtor corporation was owned by John H. Greer, Jr., representing ownership in 30, 667 shares of stock. There have never been any transactions involving this stock and stock interest from the time of its delivery by Greer to Stockton & Hing.

The stock of Harris was evidenced by Certificate No. 3 when it was delivered to Stockton & Hing as security for their fees. The originals of said certificates remain in the possession of Stockton & Hing at the date of filing this Petition for Writ of Certiorari.

The law firm of Stockton & Hing has continuously retained the possession of stock certificate No. 3 in the name of Harris for 30,667 shares.

On or about October 13, 1973, a sale of the Harris stock in Southwest Restaurant Systems, Inc. was made to Greer and stock certificate No. 3 was marked "Void" on its face, and the corporation issued a new stock certificate in the name of John H. Greer, Jr. The new stock certificate was certificate No. 4. At the time certificate No. 3 was voided, the new certificate No. 4 was issued and Greer executed a stock power leaving both the certificate and stock power in the possession of Stockton & Hing as security for their attorneys' fees.

2. Possession of Certificates.

In December, 1973, stock certificate Nos. 2 and 4 were delivered by Stockton & Hing to the Clerk of the Superior Court in Maricopa County Cause No. C 249999; the Court, and all parties, had prior thereto, been given notice that the firm

of Stockton & Hing claimed a lien on said stock, and that said stock was being surrendered to the Court only on condition that a supersedeas bond be approved. This was done with full notice to all parties concerned. Since the bond was not approved, this stock was released by the Clerk of the Court to Stockton & Hing.

Except for the surrender to the Clerk of the Court as set forth above, the law firm of Stockton & Hing has been in continuous possession of stock certificate No. 4 from October 1973 to this date.

Except for the surrender to the Clerk of the Court in December 1973, as set forth above, the law firm of Stockton & Hing has been in continuous possession of stock certificate No. 2 from September 1973 to this date.

At the time of the sale by Harris of his stock represented by certificate No. 3 to Greer, Stockton & Hing momentarily released its lien on said stock in order to permit the sale, but immediately took back the new certificate, repre-

sented by stock certificate No. 4 as security for the payment of attorneys' fees, and continued to retain certificate No. 3 at all times.

On November 16, 1973, the date of the service of a Writ of Garnishment by McElhanon on the law firm of Stockton & Hing, Greer and Harris were jointly and severally indebted to the law firm of Stockton & Hing in the amount of Thirty Two Thousand Four Hundred Fifty Nine Dollars and 58/100 ($32,459.58). as and for attorneys' fees and costs expended.

As of February 14, 1975, the date of the filing of a Petition in Bankruptcy by Harris, Greer and Harris were jointly and severally indebted to the law firm of Stockton & Hing in the amount of Fifty Seven Thousand Two Hundred Eleven Dollars and 75/100 ($57,211.75).

At the time of the service of garnishment by McElhanon on Stockton & Hing, the sale of the stock from Harris to Greer had already taken place on or about October 13, 1973.

The law firm of Stockton & Hing has never

held such stock certificates as escrow agents or for purposes of litigation, but has always held such certificates as security for the payment of attorneys' fees.

3. Court's Determination that the Greer/Harris Transaction was a Fraudulent Conveyance.

On May 14, 1975, the Bankruptcy Judge made findings of fact and conclusions of law which were approved by the District Court Judge regarding the ownership of stock in determining who was entitled to vote said stock in the reorganization proceedings. The Court concluded that the sale of stock from Harris to Greer constituted a fraudulent conveyance and void and of no force and effect. The District Court, in adopting the order of the Bankruptcy Judge, further decreed that the judgment, findings and conclusions were entered without prejudice to the lien rights, if any, of the respondents in those proceedings.

. . .

. . .

. . .

The respondents included Stockton & Hing, as well as others who are not parties to this Petition.

4. Factual Differences Between Greer and Harris Stock Certificates.

The only factual differences regarding the transactions involving the security interests on the Greer and Harris stock interests are that Harris' stock was sold to Greer, a garnishment was filed upon Stockton & Hing while they had possession of the stock pursuant to a Security Agreement, and while the stock was in the name of Greer, subsequently the Court determined that the transfer was fraudulent and of no force and effect and, therefore, all parties were in the same situation as they had been prior to the transfer.

Statutes Involved

"14 A.R.S. Sec. 44-3104(3). Transactions excluded from article.

This article does not apply:

. . .

3. To a lien given by statute or other rule of law for services or materials except as provided in Sec. 44-3131 on priority of such liens; or

. . ."

"14 A.R.S. Sec. 44-3126. When possession by secured party perfects security interest without filing.

A security interest in letters of credit and advices of credit (paragraph 1, subsection B of Sec. 44-2716), goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee, receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest may be otherwise perfected as provided in this article before or after the period of possession by the secured party. As amended Laws 1975, Ch. 65, Sec. 21, eff. Jan. 1, 1976."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, THE COURT OF CLAIMS, THE SUPREME COURT OF ARIZONA, AND THE HIGHEST COURTS IN OTHER STATES REGARDING THE INTERPRETATION OF ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, SECURITY INTERESTS.

The Court below has determined that the characterization of Stockton & Hing's interest with respect to the stock is the key issue in both appeals. With this, Stockton & Hing agree. Petitioners have throughout this proceeding claimed a perfected U.C.C. security interest. The Court has determined that Stockton & Hing's claim is excluded from the U.C.C. as a common law lien pursuant to Arizona Revised Statutes, §44-3104(3) -- U.C.C. §9-104(c).

This determination is the specific error which the Court below has committed and is contrary to the law of the Supreme Court of Arizona, the highest courts in other states, the Court of Claims and the Fourth and Sixth Circuits. The issue is highly significant to the orderly conduct of commercial business and is worthy of the Supreme Court's consideration because to have

a conflict among the Federal courts on a Uniform Commercial Code security interest issue would frustrate the clear intention of contracting parties to create and grant U.C.C. security interests. U.C.C. security interests are greater than and superior to non-consensual liens which are excluded from coverage under the U.C.C.

The ruling by the Court below is a determination that parties are not allowed to make an agreement to create a greater and superior lien which would be protected by Uniform Commercial Code. Such preclusion is not the law in the Federal courts nor the State courts.

Article 9 of the U.C.C. provides (A.R.S. §44-3126; U.C.C. §9-305) for perfection of certain security interests by taking possession of collateral without filing. This includes instruments and negotiable documents and, therefore, encompasses the stock certificates and stock interests which are the subject of this case.

Stockton & Hing have taken possession of the stock certificates pursuant to an oral

security agreement which was later affirmed in writing by the parties. The opinion of the Court of Appeals, in fact, agrees with this factual determination (Appendix "A"):

> " . . . Mr. Robert Ong Hing instructed Harris and Greer to deliver to the law firm their stock certificates, Nos. 3 and 2, respectively, which represented their ownership shares in the debtor corporation. These certificates were, in fact, deposited with Stockton & Hing with the apparent understanding that the stocks would be held as security for payment of attorneys' fees both owing and to be incurred in the future." (Emphasis added)

The opinion goes on to state that the certificates were not endorsed, and lacking such endorsement, Stockton & Hing had a mere retaining lien and not an enforceable security interest. The stock powers which were signed in blank and

delivered to Stockton & Hing along with the stock certificates are the same as an endorsement and, in law, take the place of an endorsement. In any event, A.R.S. §44-3126 and U.C.C. § 9-305 do not require an endorsement.

No law prevents an attorney from contracting with his client to receive a greater lien on property which is also the subject of a common law retaining lien.

There is no provision of the Uniform Commercial Code or other authority which prohibits the creation of a security interest where a statutory or common law lien is available. There also is no language in the official comments which indicate that one faced with a choice must choose the statutory or common law lien to the exclusion of a contractual security interest. In fact, the U.C.C. encourages the creation of multiple remedies, providing that a creditor is authorized to secure his rights with security in both real and personal property. U.C.C. §9-501(4), A.R.S. §44-3147(B). See also, O'Dell

v. Kunkel's, Inc., 581 P.2d 878 at 881 (Okla. 1978) which states:

> "The fact that the O'Dells necessarily take free from any security interest Kunkel's may have attempted to reserve under the U.C.C. does not compel the conclusion that Kunkel's waived its right to pursue some other remedy afforded it by law. The U.C.C. does not preclude a creditor in the proper factual circumstances from protecting his interest in goods in more than one way. The U.C.C. actually encourages the reservation of multiple remedies. 12 A O.S. 1971, §9-501. A creditor is specifically authorized under the U.C.C. to secure to himself rights and remedies as personal property or ' . . . as to both the real and the personal property . .' 12A O.S. 1971, § 9-501(4)".

The exclusion by A.R.S. § 44-3104(3) of Rule of Law Liens from the Uniform Commercial Code, does not prevent an attorney from contracting for a Uniform Commercial Code security interest lien on the same property for which he may also have a common law retaining lien. The landlord's lien cases are closely analogous to attorney lien situations. A.R.S. §44-3104(2) and U.C.C. §9-104(b) provide that landlord liens are excluded from coverage under Article 9 of the U.C.C. The Sixth Circuit has interpreted this language to mean that "statutory" landlord liens are excluded but not "contractual" landlord liens. In Re Lickie Freeburn Coal Company, 405 F.2d 1043 (6th Cir. 1969), citing In Re King Furniture City, Inc., 240 F.Supp. 453 (Ark. 1965).

The same proposition is also clearly stated in Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C.App. 242, 178 S.E.2d 124 (1970). In this case, the lessor had a lien pursuant to a lease and took possession of the leasehold property after default without filing

a financing statement. It was held that the landlord lien exclusion applied to statutory liens and not contractual liens and perfection occurred when the lessor took possession of the property, thereby obtaining priority against a competing seller of the personal property under a conditional sales contract.

U.C.C. § 9-104 excludes certain types of transfers from coverage under the U.C.C. because liens created by such transfers are nonvoluntary. 1 Bender U.C.C.S., Secured Transactions § 5.07. One such exclusion is a lien for services. U.C.C. § 9-104(c). However, in the instant case since we are dealing with a voluntary and consensual lien and anheir intended to fall under the code by parties creating the lien, the excluded involuntary liens contemplated by the cited sections do not apply.

Since the Court has determined that there was an "apparent agreement", to give the stock as security for fees, and there was no evidence presented to contradict such an agreement, the

lien and security interest created is a consensual lien. The Fourth Circuit has stated that there is a policy of including all consensual secured transactions involving personal property within the scope of Article 9, Whitmer v. Kleppe, 469 F.2d 1245 at 1248 (4th Cir. 1972).

In Arizona, it is clearly the law that the existence of an equitable lien is determined by the intention of the contracting parties as manifested in the contract taken as a whole. City of Glendale v. Arizona Savings & Loan Association, in Receivership, 2 Ariz.App. 379, 409 P.2d 299 (1965). The equitable lien can arise from an express contract when the parties indicate an intent to charge or appropriate particular property as security for an obligation, and it is the intention of the parties that control. Kalmanoff v. Weitz, 8 Ariz.App. 177, 444 P.2d 728 (1968). Since it is clear that an equitable lien can be established by an agreement and intention of the parties to charge certain property as security for an obligation,under Arizona law,

that specific equitable lien would be given the protection of the Uniform Commercial Code if it is perfected by the taking of possession. A mere retaining lien by contrast does not require the express agreement or implied agreement of the parties.

In Cleveland Chair Company v. United States, 557 F.2d 244 (Court of Claims 1977), the United States Court of Claims, at page 246, has stated:

> "Paragraphs (3) and (37), §1-201 of the Uniform Commercial Code, provide respectively that an 'agreement' within the meaning of Article 9 may be implied from the circumstances surrounding a transaction, and that a 'security interest' within the Article is an interest in personalty which an owner transfers to a creditor in order to secure the payment of an obligation. Thus, for Article 9 purposes, there may be a common-law implied agreement."

The conclusion to be drawn from the above authorities is that a lien which is excluded by A.R.S. §44-3104 — U.C.C. § 9-104 by statute or rule of law, may nevertheless be a proper U.C.C. security interest lien if agreed upon by the parties. This was clearly the case between Stockton & Hing and Greer and Harris. The shares were delivered to Stockton & Hing along with a signed stock power specifically to secure Stockton & Hing's attorneys' fees. This is an uncontroverted express agreement. This gave Stockton & Hing additional rights that they would not have had with a mere retaining lien. The stock powers and possession of the certificates constituted a complete assignment for purposes of perfecting a U.C.C. security interest. An agreement of the parties was absolutely not necessary for Stockton & Hing to have a retaining lien. Since the agreement does exist, there is a security interest perfected under and protected by the U.C.C.

Stockton & Hing acquired a greater lien than

a retaining lien because of the agreement. The agreement of the parties, as evidenced by Mr. Hing's affidavit and the testimony of Gilbert Harris, has never been controverted or challenged and must be and has been accepted as conclusive evidence that an agreement existed.

Even if Stockton & Hing has a retaining lien, they can also have a collateral or security interest in the same property. The existence of one type of lien does not exclude the existence of other types. O'Dell, supra.

In Savic v. Kramlich, 12 P.2d 260 (Idaho 1932), the Court was presented with the exact situation as faced by the Court in this case. The attorney and client agreed to create a lien which was superior to the attorney's retaining lien. Plaintiff had hired his attorney to file suit to have certain corporate stock issued which had been withheld by the corporation. The plaintiff granted the attorney a collateral lien on the stock by an assignment which was in addition to the attorney's statutory retaining

lien. After the granting of the assignment, the corporation obtained a judgment against the plaintiff and executed on and sold his stock interest. (Presumably, the corporation was also the purchaser.) The Court held, among other things: (1) the stock was "issued" to the plaintiff at the time the stock was paid for by the transfer of the property, even though a certificate had not been prepared and delivered; (2) the assignment to the attorney was valid and the attorney had both his collateral lien and his statutory lien. Further, he did not lose or waive his statutory lien by taking other security for his debt; (3) the attorney's collateral lien was superior to the judgment lien of the corporation against plaintiff-stockholder since the assignment was prior to the corporation becoming a creditor and the corporation had notice of the lien prior to its execution sale.

As stated above, the facts in Savic, are almost identical as the facts involved in the instant case. Stockton & Hing obtained a valid

U.C.C. lien by an agreement of the parties, and it was perfected by possession. Afterwards, the debtor corporation obtained judgments against Greer and Harris. The judgments have offset the amount of distribution to the shareholders based on the judgments which were obtained after the perfection of the security interest and lien of Stockton & Hing.

It is basic that the first in time is first in right as to the proceeds of collateral and priority between competing lienholders. The most that the intervening bankruptcy can do is to offset any judgment against Greer and Harris as to distributions they would receive after payment of prior perfected liens which exist in relation to the stock interest.

Since Stockton & Hing had a prior perfected security interest, distribution and proceeds should be made to them prior to offsetting a judgment of the debtor corporation against Greer and Harris.

The issue at bar is of vital importance and

must be resolved by this Court because of the conflict created by the Ninth Circuit in not following established law created by the Court of Claims, state courts and other circuits regarding the interpretation of the Uniform Commercial Code. To let this determination stand is to frustrate accepted commercial practices regarding the right to contract for liens superior to statutory and common law liens.

ISSUES REGARDING
CAUSE NO. 77-3229

Since the issue of whether Stockton & Hing had a security interest by an agreement should be resolved in favor of Stockton & Hing, the only issue remaining with respect to the Harris stock is whether the Stockton & Hing lien remained effective after the voiding of certificate No. 3 and the taking of certificate No. 4 in its place.

The District Court determined that the transfer from Harris to Greer was a fraud on creditors as to McElhanon's garnishment. The effect of the order is to place the parties in the same

situation as prior to the transaction. Stockton & Hing had a perfected security interest by possession of both certificate Nos. 3 and 4, and whether the transaction is considered to have been voided or not, Stockton & Hing's priority has not changed. It had a valid and perfected security interest in the stock interest of Harris whether represented by certificate No. 3 or certificate No. 4. Any lien which McElhanon's garnishment may have created was subordinate to the lien of Stockton & Hing.

To hold otherwise again is to frustrate the accepted commercial practices of perfecting security interests by taking possession of the stock. Since the Sheriff did not obtain possession of the stock, then McElhanon's garnishment cannot establish a lien superior to Stockton & Hing's.

It is urged that the analysis by the Honorable William P. Copple as set forth in Appendix "C" attached hereto, be adopted as the law of this case. This opinion holds that the

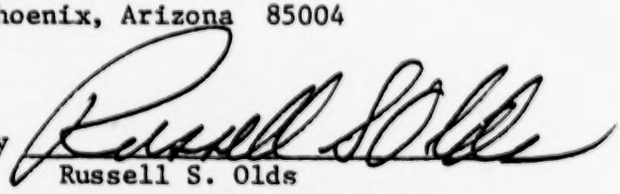
attempted garnishment by McElhanon did not affect the rights of Stockton & Hing, and to hold otherwise is inconsistent with Arizona's policies favoring secured creditors and giving them a right to rely on physical possession of the securities. The Court further stated that Stockton & Hing had possession of the securities and had taken all possible steps to maintain the perfection of its security interest.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 2nd day of January, 1980.

Russell S. Olds, Esq.
STOCKTON & HING
234 North Central Avenue
Suite 507
Phoenix, Arizona 85004

By 
Russell S. Olds
Attorneys for Petitioner

Certificate of Service

I hereby certify that on this 1st day of January, 1980, the Petition for Writ of Certiorari were mailed, postage prepaid, to:

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STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED and SWORN TO before me this 1st day of January, 1980.

Notary Public

My Commission Expires:
9-11-83

APPENDIX

TABLE OF CONTENTS

Appendix		Page
A.	Opinion of the Ninth Circuit Order Denying Petition for Rehearing	1
B.	Opinion of District Court Judge, Cause No. CA 77-3613	23
C.	Opinion of District Court Judge, Cause No. CA 77-3229	37

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHWEST RESTAURANT SYSTEMS, INC., an Arizona corporation, dba Pinnacle Peak Patio,	)	
JOHN EVANS, Trustee-Appellant,	)	
v.	)	No. 77-3613
STOCKTON & HING, Creditor Appellant.	)	
HARVEY R. McELHANON, JR., and DORREEN T. McELHANON, his wife, Plaintiffs-Appellants,	)	No. 77-3229
v.	)	
WALLACE PERRY, Reciever, Defendant,	)	OPINION
and	)	
HENDERSON STOCKTON and ROBERT ONG HING dba STOCKTON & HING, Defendants-Appellees.	)	

Appeal from the United States District Court for the District of Arizona

Before: TUTTLE,* DUNIWAY, and ELY, Circuit Judges

ELY, Circuit Judge:

The subject cases have been consolidated on appeal. For purposes of clarity, however, the facts of each cause are outlined separately, and the resolution of the issues

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*The Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

presented has been, where approrpriate, similarly divided.

FACTS

No. 77-3613

Prior to 1975, Charles G. Harris (:Harris:), John H. Greer, Jr., ("Greer") and Harvey G. McElhanon, Jr. ("McElhanon") were each 1/3 owners of Southwest Restaurant Systems, Inc. ("The debtor corporation").[1/] In 1972, Harris and Greer first secured the

services of the law firm of Stockton & Hing with respect to an arbitration hearing. The law firm was paid in full for its services shortly after the hearing.

In May, 1973, Harris and Greer retained Stockton & Hing for other legal proceedings. In September of 1973, with an unpaid balance of approximately $10,000 owing to the law firm, Mr. Robert Ong Hing instructed Harris and Greer to deliver to the law firm their stock certificates, Nos. 3 and 2, respectively, which represented their ownership shares in the debtor corporation. These certificates were, in fact, deposited with Stockton & Hing with the apparent understanding that the stocks would be held as security for payment of attorneys' fees, both owing and to be incurred in the future. The certificates, however,

were never endorsed by Greer or Harris. At the present time, Stockton & Hing claim that Harris and Greer owe the law firm in excess of $67,000 for legal services rendered.

On October 14, 1975, the Bankruptcy Court approved the Trustee's Plan of Reorganization for the debtor corporation under Chapter X. The sale and distribution Order provided that after payment of claims and administrative costs, any sums remaining would be distributed pro rata to stockholders, less any amounts found due the corporation from the stockholders by reason of loans, indebtedness, or liabilities. The Order also provided that any "liens" on stockholder interest that existed prior to cancellation of said stock shall, if valid and enforceable against the Trustee, all attach . . . to the

proceeds of said escrow and other assets in the hands of the Trustee . . ."

The debtor corporation secured a judgment against Greer in the amount of $350,000 in December of 1975. Judgment against Harris, also in favor of the corporation, was rendered in March, 1977, for a sum in excess of $445,000. Neither judgment was satisfied.

In May, 1977, the Bankruptcy Court authorized the interim distribution to stockholders pursuant to the October Order of sale and distribution. Because the unsatisfied judgments against Harris and Greer exceeded their pro rata shares as shareholders, these two received no distribution proceeds. Stockton & Hing objected, contending that the law firm should receive 2/3 of the distribution proceeds because of its lien rights in the Harris and Greer stock interests.

The Bankruptcy Court rejected the contention that the law firm's lien was not subject to the offsets against Harris and Greer. On August 19, 1977, the District Court affirmed the Bankruptcy Court, holding that Stockton & Hing's interest was an attorney's retaining lien that was subject to the above-described offsets. Stock & Hing appeal.

No. 77-3229

On October 13, 1973, McElhanon obtained a judgment of $200,000 against Harris based on a claim of debt. Very shortly after entry of judgment, and apparently on advice of Stockton & Hing, Harris sold his stock in the debtor corporation to Greer. To permit this sale, Stockton & Hing momentarily released its lien on Harris' stock. Stock certificate No. 3, representing

Harris' original ownership, was marked "void" on its face, and the debtor corporation was asked to issue a new stock certificate in Greer's name. The company complied, issuing certificate No. 4. This new stock certificate and the "voided" No. 3 certificate were retained by Stockton & Hing.

Greer executed a promissory note in the amount of $12,500 payable to Harris. Harris promptly assigned the note to Stockton & Hing. Harris also assigned to Stockton & Hing his entire interest under the agreement between Harris and Greer relating to the sale of stock. On October 20, 1973, McElhanon, in an attempt to satisfy his judgment, caused a writ of execution to be issued and writs of garnishment to be served on Harris and the debtor corporation. On November 16, 1973, writs of garnishment

were also served on Robert Ong Hing, Stockton & Hing, and Greer. All of the garnishees filed verified answers denying that Harris owned any stock in the debtor corporation and asserting that Harris had previously sold his stock to Greer.

On November 14, 1973, Harris and Greer executed a promissory note on behalf of themselves, individually, and also on behalf of the debtor corporation, payable to the order of Stockton & Hing in the amount of $25,000.

On December 5, 1973, Stockton & Hing surrendered possession of both Greer stock certificates (Nos. 2 and 4) to the Clerk of the Maricopa County Superior Court in an attempt to secure a supersedeas bond. The court and all concerned parties were given notice that the law firm claimed a lien on the stock,

and the certificates were surrendered only on condition that the supersedeas bond be approved. Because the bond was not approved, the stock was redelivered to Stockton & Hing.

On May 14, 1975, the Bankruptcy Court found that the October, 1973, sale of stock between Harris and Greer was a fraudulent conveyance made with the intent to defraud or hinder McElhanon in the collection of his judgment. The attempted transfer was held to be void and of no force and effect. The District Court adopted the Bankruptcy Court's findings and conclusions on May 27, 1975.

Meanwhile, on May 16, 1975, McElhanon and his wife, Doreen, filed a Complaint to recover property and determine the validity, priority, and extent of lien. Inasmuch as Harris had filed a Petition for Bankruptcy in February of

1975, the McElhanon Complaint originally named the Receiver of the bankrupt as defendant. The McElhanons filed an Amended Complaint on June 3, 1975, naming the Receiver, Robert Ong Hing, Henderson Stockton, and the law firm of Stockton & Hing as defendants. Stockton & Hing answered and filed a counterclaim and crossclaim for attorneys' fees, asserting priority of its lien on Harris' stock in the debtor corporation.

On January 17, 1977, the Bankruptcy Court entered summary judgment in favor of the McElhanons. The court concluded that when the Harris stock certificate (No. 3) was marked void on its face in October, 1973, the certificate "became absolutely non-negotiable and ceased to represent Harris' stock interest in Southwest Restaurant Systems, Inc." The court further concluded that

that Stockton & Hing held only a retaining lien as to the voided certificate. Thus, the court held that the restraining lien had no effect on Harris' stock interest and that McElhanon acquired a perfected superior lien on Harris' interest by reason of the writs of garnishment served upon Harris and the debtor corporation.

The Federal District Court reversed the Bankruptcy Court on June 30, 1977. It held that the writs of garnishment did not create a superior lien to Stockton & Hing's lien because the stock certificate was not actually seized by the officer making the attachment. The District Court also held that Harris' stock could not be deemed "to have been constructively surrendered to the issuer for purposes of determining the validity of the attempted garnishment." The court

reasoned that Arizona's adoption of Article 9 of the Uniform Commercial Code represented a policy decision in favor of allowing creditors, including one such as Stockton & Hing, to obtain protectable security interests. The McElhanons appeal.

ANALYSIS

The characterization of Stockton & Hing's interest with respect to the stock in debtor corporation is a key issue common to both appeals. Throughout these proceedings, the law firm of Stockton & Hing has contended that its interest in Harris' and Greer's stock is a prefected security interest under Article 9 of the Uniform Commercial Code, as adopted by Arizona. The law firm claims that its security interest was perfected in September of 1973 when the stock certificates were delivered by

Harris and Greer to the firm. Stockton & Hing points out that a security interest may be perfected in Arizona by taking possession of the collateral. See A.R.S. 44-3126.

We reject the contention, however, that Stockton & Hing's interest in the stock constitutes a perfected security interest under Article 9. Section 9-104(c)-- A.R.S. 44-3104(3)--specifically excludes common law liens for services from the scope of Article 9:

> This Article does not apply . . . to a lien given by statute or other rule of law for services or materials . . .

Traditionally, attorneys' liens are of two types: specific charging liens, and general possessory or retaining liens. A charging lien attaches to the particular fund or other property created or secured through the

attorney's efforts. A possessory or retaining lien, on the other hand, enables the attorney to retain a client's records or other property until the client pays for all of the legal fees owing the attorney. See Restatement of Security 62(b) and Comment (j); Restatement 2d of Agency 464(b); Adams, George, Lee, Schulte & Ward, P.A. v. Westinghouse Electric Corp., ____F.2d____ (5th Cir. June 22, 1979) (No. 77-1650). Cf. In Re Diplomat Electric, Inc., 499 F. 2d 342, 348 (5th Cir. 1974) (charging lien under Florida Law); United States v. Fidelity Philadelphia Trust Co., 459 F. 2d 771, 774 (3d Cir. 1972) (charging lien under Pennsylvania law); In re Browy, Brannon v. Gay, 527 F. 2d 799, 801 (7th Cir. 1976) (retaining lien under Illinois law).

Arizona case law has focused

exclusively upon attorneys' charging liens. See, e.g., Linder v. Lewis, Roca, Scoville & Beauchamp, 85 Ariz. 118, 333 P. 2d 286 (1958); Richfield Oil Corp. v. La Prade, 56 Ariz. 100, 105 P. 2d 1115 (1940). While Arizona law has not addressed the question of attorney retaining liens, we presume that Arizona will follow the Restatement. Smith v. Normart, 51 Ariz. 134, 143, 75 P. 2d 38, 42 (1939). As indicated above, the Restatement recognizes an attorney's general possessory lien, as security for amounts due, on papers and other chattels that come into an attorney's possession. Thus, we find that Stockton & Hing's interest in the stock cerfiticates is properly characterized as an attorney's retaining lien. Except under circumstances not here applicable, the possessor lienor generally "has only a

privilege of forclosure . . ." Restatement of Security 72(1) and Comment a.

No. 77-3613

As noted above, the Bankruptcy Court cancelled the outstanding stock of debtor corporation in October of 1975, and substituted a pro rata right to share in the distribution proceeds, subject to offset. According to the Restatement of Security 66 Comment a: "Where . . . as a result of action by public authority a chattel is substituted in the hands of the lienor for a chattel upon which a lien exists, the lienor has the privilege of retaining the substituted chattel." Thus, we agree with the District Court's conclusion in this case that "when the October 14th order cancelled the debtor corporation's stock, Stockton & Hing retained a possessory lien on the new

bundle of rights accorded to Greer and Harris."

It is clear, however, that Greer and Harris had no right to moneys in the distribution, for their pro rata shares were more than offset by the unsatisfied judgments the debtor corporation claimed against them. There is little dispute that the Bankruptcy Court was authorized to alter the rights of the stockholders under Chapter X reorganization plans. 11 U.S.C. 616(1): Additionally, there is no question but that the court could offset the judgments of the debtor corporation against Greer and Harris in ordering the distribution. Because Stockton & Hing's retaining lien does not give the law firm an interest greater than that of Greer and Harris, we affirm the District Court's conclusion that the law firm was not entitled to any part of

the distribution proceeds.

No. 77-3299

In this proceeding, the District Court, reversing the Bankruptcy Court, held that McElhanon did not perfect a security interest in Harris' stock superior to Stockton & Hing's interest when the McElhanon caused writs of garnishment to be served upon Harris and the debtor corporation in October of 1973. We reverse.

We agree with the Bankruptcy Court's determination that Harris' stock certificate became non-negotiable and ceased to represent Harris' stock interest when the certificate was voided on its face in October, 1973. Stockton & Hing's retaining lien covered, therefore, a voided certificate that ceased to be of value.

The law firm contends, however, that its possession of certificate No. 4, issued by the debtor corporation to Greer, gives the law firm a continuing interest in the stock. This argument must also be rejected. The Bankruptcy Court's decision in May of 1975 clearly declared the attempted transfer between Harris and Greer to be void and of no force and effect. Thus, certificate No. 4 was, in effect, rendered non-negotiable and without value by the court's decision.

A security that has been surrendered to the issuer may be attached at the source, i.e., at the issuer's office. See U.C.C. 8-317 (A.R.S. 44-3032). The District Court intimated that Harris' stock might be deemed "to have been constructively surrendered to the issuer for purpose of determining the validity

of the attempted garnishment" were it not for the adoption of Article 9 in Arizona representing a policy decision in favor of allowing creditors to obtain protectable security interests. It is now evident, however, that Stockton & Hing never possessed an Article 9 security interest with respect to stock in the debtor corporation. And, after certificate No. 3 was voided in October, 1973, and the attempted Harris-Greer stock conveyance was declared to be void and without legal effect, Stockton & Hing ceased to possess a meaningful retaining lien on Harris' stock interest. In these circumstances, therefore, there is no conflict between the important policies of the Uniform Commercial Code, adopted by Arizona, and the finding that Harris' stock was constructively surrendered to

the debtor corporation for purposes of determining the validity and effect of McElhanon's writs of garnishment.

By causing a writ of garnishment to be served upon the debtor corporation, McElhanon acquired an inchoate lien. See Kuffel v. United States, 103 Ariz. 321, 441 P. 2d 771 (1968). We note the viable status of an inchoate garnishment lien in bankruptcy when established more than four months before the filing of bankruptcy. See 4 Collier on Bankruptcy 67.10, at 131-32 (14th ed. 1971).

CONCLUSION

In light of the foregoing, we affirm the District Court's judgment in Evans v. Stockton & Hing, No. 77-3613.

We reverse the District Court's judgment in McElhanon v. Perry,

No. 77-3229, and remand that cause for proceedings consistent with this Opinion.

SO ORDERED

FOOTNOTE:

1.

Relief was originally sought in July of 1974 under Chapter XI of the Bankruptcy Act. 11 U.S.C. 701 et seq. Upon motion of the Receiver, the Bankruptcy Court ordered that the proceedings be converted from a Chapter XI arrangement to a reorganization under Chapter X of the Act. 11 U.S.C. 501 et seq.

filed 9/5/79.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Formal Caption Omitted	)	No. 77-3613
	)	No. 77-3229

Before: TUTTLE,* DUNIWAY, and ELY, Circuit Judges

The Petition for Rehearing is denied.

*The Honorable Elbert P. Tuttle, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

filed 10/4/79.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re the Matter of	)
	) No. 74-1189
SOUTHWEST RESTAURANT SYSTEMS,	) PHX ED WPC
INC., an Arizona	)
corporation, dba Pinnacle	) MEMORANDUM
Peak Patio,	) AND ORDER
	)
Debtor.	)
	)

On May 6, 1977, the Bankruptcy Court approved a petition for interim distribution of proceeds to stockholders of the debtor corporation and determined the final compensation of the trustee. This appeal arises from objections to both the interim distribution and the award of compensation. It is deemed submitted, no request for oral argument having been made and the Court desiring none.

(A) Interim Distribution to Stockholders

Under the approved distribution plan, a stockholder's right to share in proceeds is conditioned by an offset of all outstanding

claims the debtor corporation has against a stockholder. The trustee has judgments against two stockholders of the debtor corporation, Greer and Harris, and, because of the offset clause, they have no share in the distribution. The stock certificates of Greer and Harris are held as security for the payment of legal fees by appellant Stockton & Hing, a law firm which represented the two stockholders in various matters. On the basis of this lien, Stockton & Hing claim they are entitled to a share of the interim distribution regardless of the offsets the debtor corporation has against Greer and Harris. To analyze this contention, Stockton & Hing's rights in the stock collateral must first be characterized and then contrasted with the powers of the Bankruptcy Court under Chapter X of the Bankruptcy Act.

Stockton & Hing argue they have perfected a security interest in the stock pursuant to article nine of the Uniform Commercial Code.

This assertion is grounded on a prior decision of this Court, In re Charles Harris, No. B-75-320/A/Phx/ED/WPC (June 30, 1977). Charles Harris involved a dispute between Stockton & Hing, who posses Harris' stock certificates, and McElhanon, a judgment creditor of Harris who issued a writ of garnishment against the stock. Inasmuch as the writs were issued against Harris and Southwest Restaurant Systems, this Court held they did not create a valid lien. Although Charles Harris in dictum referred to Stockton & Hing's interest in the stock as a security interest, the Court did not face the issue of priority and, hence, did not characterize Stockton & Hing's interest.

U.C.C. 9-104(c) specifically excludes common law liens for services from the scope of article nine. See A.R.S. 44-3104(3). Stockton & Hing are not article nine creditors. Rather, Stockton & Hing's rights in the stock are those of a common law attorney's retaining

lien. Although Arizona case law has focused exclusively on attorney's charging liens[1] - liens looking to the proceeds of a judgment or settlement - presumably, Arizona will follow the Restatement. Smith v. Normant, 51 Ariz. 134, 143, 75 P. 2d 38, 42 (1938). Restatement Securities 62(b) recognizes an attorney's general possessory lien, as security for amounts due, on papers and other chattels which come into an attorney's possession. See also Restatement 2d Agency 464(b).

Stockton & Hing came into possession of the stock certificates in September of 1973. Subsequently, Southwest Restaurant Systems, Greer, and Harris entered into separate bankruptcies.[2] On October 14, 1975, the Bankruptcy Court cancelled the outstanding stock of the debtor corporation, substituting a pro rata right to share in distribution proceeds, subject to the offset. The crucial issue in this case is what lien rights does a

lawyer retain when collateral in his possession is cancelled, and new rights substituted therefor? The Restatement Securities addresses the question directly. "Where . . . as a result of action by public authority a chattel is substituted in the hands of the lienor for a chattel upon which a lien exists, the lienor has the privilege of retaining the chattel." Id. 66 Comment (a). Hence, when the October 14th order cancelled the debtor corporation's stock, Stockton & Hing retained a possessory lien on the new bundle of rights accorded Greer and Harris.

Stockton & Hing argue that their lien interests are superior to the trustee's power to offset. However, Stockton & Hing can demonstrate no claim against the trustee,[3] and advance no reason why the trustee must account for their interests apart from the rights of Greer & Harris.[4] Moreover, the October 14th order modifying rights in the stock is

unassailable. 11 U.S.C. 616(1) authorizes reorganization plans under Chapter X to alter the rights of stockholders. A bankruptcy court has the further equitable power to subordinate the stock claims of negligent directors, or directors who breach fiduciary duties owed to the debtor corporation, to the claims of other stockholders. In re Automatic Washers Co., 226 F. Supp. 834, 836 (S.D. Iowa 1964), aff'd 338 F. 2d 1006 (8th Cir. 1964); In re Texas Portland Cememt Co., 205 F. Supp. 159, 162 (E.D. Tex. 1962). Stockton & Hing's retaining lien grants them no greater interest than the Bankruptcy Court accorded to Greer and Harris.

(B) Award of Compensation to the Trustee

The May 6, 1977 order of the Bankruptcy Court fixed final compensation for the trustee to be $47,000, determined at an approximate rate of $40 per hour. The Court expressly found that the trustee was competent and faith-

fully performed his duties, successfully objected to certain claims against the estate, successfully instituted suits against directors and stockholders, and deposited estate funds in interest-bearing accounts. The Court further found the trustee was opposed by feuding stockholders, maintained sufficient time records to determine just compensation, and conducted a fruitful administration. Bankruptcy Rule 810 requires that these findings be accepted unless they are clearly erroneous.[5]

Appellant McElhanon, a stockholder in the debtor corporation, objects that the Bankruptcy Court's findings as to the total time expended by the trustee is contrary to the evidence. After reviewing the transcript of the April 29, 1977 hearing on compensation, it is apparent that appellant, at best, can say there is conflicting evidence as to the total time expended. However, there is substantial evidence to support the findings, including a

log book compiled by the trustee. The Bankruptcy Court's opportunity to judge the credibility of the trustee, who was a witness at the hearing, must also be given due deference. Bankruptcy R. 810. Based on the record, the Court is not left with a "definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Appellant also argues the time records of the trustee are inadequate as a matter of law. This argument is simply erroneous. York Intern. Building, Inc. v. Chaney, 527 F. 2d 1061, 1068 (9th Cir. 1975); Matter of Beverly Crest Convalescent Hosp., Inc., 548 F. 2d 405 (9th Cir. 1967). In York, there was no evidence whatsoever as to trustee time during some periods of the administration. 527 F. 2d at 1071. From what scant records that were available, the Court estimated the total time, id. at 1073, and awarded $40 per hour to the

trustee. In Beverly Crest, even though the trustee failed to keep meticulously accurate records, the Court upheld a lower court finding on total hours based on supporting evidence. In this case, the log book coupled with supporting testimony is more than adequate to base a determination as to total time.

The trustee also appeals from the May 6th order, contending that the $40 per hour rate should apply to all trustee services. In McConnell v. Estate of Butler, 402 F. 2d 362 (9th Cir. 1968), the Court noted that an attorney's compensation for arranging for time deposits of the estate's funds would be nominal. Id. at 364 n.2. Presumably, the trustee's services, in some capacities, are also entitled to only nominal compensation.

The trustee argues furthat that he is entitled to a compensatory rate higher than $40 per hour.[6] Of course, the issue of whether, on the facts, compensation is reasonable, is a

question of law.[7] In York, the Court listed guidelines to aid in this legal determination; unreasonable or excessive fees are forbidden; the Court must be alert to act for the benefit of the debtor and creditors; a trustee cannot expect compensation comparable to private employment; weight should be given to the actual time expended by the trustee, the success or failure of administration, and the trustee's adherence to his fiduciary duties; finally, the trustee's compensation in ordinary bankruptcies may be analogous. 527 F. 2d at 1068-69. See also Jacobwitz v. Double Seven Corp., 378 F. 2d 405 (9th Cir. 1967); Miller v. Robinson, 378 P. 2d 2 (9th Cir. 1967); Official Creditors' Comm. of Fox Markets, Inc. v. Ely, 337 F. 2d 461 (9th Cir. 1964), cert. denied 380 U.S. 978 (1965). Based on these factors, it is a fair conclusion that the trustee is compensated adequately. The award adequately accounts for the interests of the

trustee, creditors, and stockholders of the debtor corporation.

For the foregoing reasons,

IT IS ORDERED: The order of the Bankruptcy Court approving the petition for interim distribution and fixing final trustee compensation is affirmed in all respects.

DATED August 9, 1977.

/s/ William P. Copple
United States District Judge

FOOTNOTES

[1]See e.g., State Farm Mutual Ins. Co. v. St. Joseph's Hosp., 107 Ariz. 498, 489 P. 2d 837 (1971); Valley National Bank of Arizona v. Byrne, 101 Ariz. 363, 419 P. 2d 720 (1966); Linder v. Lewis, Roca, Scoville & Beauchamp, 85 Ariz. 118, 333 P. 2d 286 (1958); Richfield Oil Corp v. LaPrade, 56 Ariz. 100, 105 P. 2d 1115 (1940).

[2]An attorney's general possessory lien is not discharged by the bankruptcy of the debtor. Restatement Securities 81.

[3]Prior to any pro rata distribution to stockholders, the October 14th order provides that all valid and enforceable claims against the trustee, arising from stock ownership or liens on stockholder interest existing prior to cancellation of the stock, must first be paid. Stockton & Hing do not fall within this section as they have no claim enforceable against

the trustee.

[4]A lawyer's possessory lien cannot be reduced to cash by sale of the chattel or foreclosure suit. Restatement Securities 72. "The general rule of the common law is that a lienor has only a privilege of retention." Id. 72 Comment (a). Of course, the advantage of a possessory lien is that the holder can seek judgment against the debtor and then execute the judgment against goods in the holder's possession.

[5]The clearly erroneous standard is similar to Fed. R. Civ. P. 52(A). See C. Wright & A. Miller, Fed. Prac. and Pro.: Civil 2585.

[6]The trustee apparently relies on the $50 per bour rate approved by the court in Beverly Crest for this assertion. However, in Beverly Crest the court noted that the efforts of the trustee "Present a remarkable records of successful administration." 548 F.

2d at 820. Moreover, the court was acting to reduce an award of $85 to $50 per hour.

[7]11 U.S.C. 641 authorizes reasonable compensation for trustee services. See generally 6A Collier on Bankruptcy 13.02.

FILED August 19, 1977

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of	)	
	)	
CHARLES GILBERT HARRIS,	)	In Bankruptcy
	)	
Bankrupt.	)	
	)	
HARVEY R. McELHANON, et ux.,	)	No. B-75-320/ A/PHX/ED/WPC
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	OPINION
	)	
WALLACE PERRY, et al.,	)	
	)	
Defendants-Appellants.	)	

This appeal involves a dispute over the competing rights of judgment lien creditors and a law firm that has a security interest in certain shares of stock issued by Southwest Restaurant Systems, Inc. This security interest was acquired by the firm of Stockton & Hing and to secure fees due from Gilbert Harris. After the firm acquired possession of Harris' stock certificate, Harvey R. and

Dorren T. McElhanon obtained a judgment against Harris. Immediately after the judgment was entered, Harris transferred his stock to John H. Greer. Stockton and Hing obtained possession of both Greer's certificate and Harris' certificate, the latter of which was marked "void". The McElhanons attempted to garnish these shares.

The bankruptcy judge made the following pertinents findings of fact. Harris' stock certificate was delivered to Stockton and Hing before the McElhanon's obtained the judgment.[1] When the stock was transferred to Greer, Harris' certificate was labeled "void" and he was no longer listed on the corporation's books and records as the owner of the shares. Stockton and Hing retained possession of Harris' stock certificate and retained a lien on it.[2] Some time after the Harris-to-Greer transfer, the McElhanons served writs of garnishment directed at Harris' stock certificate. The writs were

served first upon Harris and later upon the corporation.

The Harris-Greer transfer was found to be a fraudulent conveyance in In Re Southwest Restaurant Systems, Inc., No. B-74-1189-PHX-ED WEC (D. Ariz. May 27, 1975). In that case the transfer of stock from Harris to Greer was held to be "void and of no force and effect" and Harris, Greer and the McElhanons were each declared to own approximately one-third of the stock in Southwest Restaurant Systems, Inc. The order expressly provided, however, that judgment was entered "without prejudice to the lien rights, if any, of the respondents in these proceedings."[3]

The order of the bankruptcy judge that is the subject of this appeal decreed that the McElhanons "have a first and superior lien against bankrupt Charles Gilbert Harris' 30,667 shares of stock in Southwest Restaurant Systems, Inc." This order can be affirmed only if two

separate issues are resolved in favor of the appellees. First, one of the writs of garnishment must have been effective to create a lien. Second, assuming that the writs created a lien, it must have had priority over Stockton and Hing's security interest.[4] This Court's disposition of the first issue, however, makes consideration of the second unnecessary.

Arizona's Uniform Commercial Code provides that no levy or attachment shall be valid until the stock certificate is "actually seized by the officer making the attachment." A.R.S. 44-3032(A) (1967). The controlling authority on the relationship between that statute and the garnishment statutes is Tyron v. Silverstein, 10 Ariz. App. 25, 455 P. 2d 474 (1969). Although the statute construed in that case has since been replaced by section 44-3-32(A), it did not materially differ from the latter statute. See Id. at 28, 455 P. 2d at 477, n.1.

The holding of the Tyron case is that Arizona's garnishment statutes have been impliedly amended to require that when shares of stock are garnished, the writ of garnishment must be served upon a "person having possession of the certificate." Id. at 31, 455 P. 2d at 480. Since Stockton and Hing possessed the only certificates that represented the shares in question, neither the writ served on Harris nor the writ served on the corporation could have been effective unless an exception to the statute was applicable.

Section 44-3-32(A) provides that "a security which has been surrendered to the issuer may be attached and levied upon at the source." This exception apparently underlies the bankruptcy court's conclusion that there was no conflice with the uniform commercial code because there were no outstanding certificates at the time the writs were issued. Sincer Greer's certificate was outstanding at

that time, it appears that the court's decision was based on the prior ruling that the Harris-Greer transfer was void.

Such reasoning leads to an unsettling anomoly. If the Harris-Greer transfer had not been declared void, Greer's stock certificate would have represented the 30,667 shares and the writs could not have been valid. If the transfer had never occurred, Harris' certificate would not have been voided and would have represented the 30,667 shares and the writs could not have been valid. To conclude that since the transfer actually occurred but was of no force and effect, the result must be different from what it would have been if the transfer had been effective and different from what it would have been if the transfer had never occurred seems at least illogical.

At the time the writs were issued, the shares were in fact represented by Greer's certificate and not as the bankruptcy court

concluded unrepresented by any outstanding certificate. It may be, however, that the bankruptcy court reasoned that neither a certificate marked "void" nor one that was subsequently declared void could represent the 30,667 shares and deemed the stock to have been constructively surrendered to the issuer for purposes of determining the validity of the attempted garnishment. Such reasoning might be justified if the result would materially advance the policies of Arizona's UCC.

The adoption of Article 9 represented a policy decision in favor of allowing creditors to obtain protectable security interests. This is to encourage them to facilitate commercial activity by extending credit.

In the case of security interests in stock Arizona has opted to allow possession of the instrument as the only method of perfection. A.R.S. 44-3125(A) (Supp. 1976-77).[5] See also Id. 44-3126. The limited exception allowing

perfection to continue after the instrument has been delivered to the debtor for certain purposes, see id. 44-3125(E)(2), is merely additional evidence of the strong policies in favor of secured creditors.

Arizona's decision to link the effectiveness of a writ of garnishment to physical possession of the certificate is entirely consistent with these policies. The purpose of section 44-3032 is to prevent levying creditors, such as the McElhanons, from securing rights paramount to persons having actual, lawful possession of the instrument. UCC Comment 8-317.[6]

Since the bankrupty court's fuling is inconsistent with Arizona's policies favoring secured creditors and giving them a right to rely on physical possession of the securities, it is an unlikely interpretation of Arizona law. The policies underlying Articles 8 and 9 are more fully carried out by giving effect to

the writs of garnishment only if they were served upon someone in possession of the stock certificate that was recognized at that time as representing the shares. Since Stockton & Hing had possession of the certificate and had taken all possible steps to maintain the perfection of its security interest, the writs served on Harris and the corporation could not have created a lien on the stock.

IT IS ORDERED:

The judgment of the bankruptcy court giving the McElhanons a "first and superior lien" against the 30,667 shares of stock owned by the bankrupt Charles Gilbert Harris is reversed. The matter is remanded to the bankruptcy court for further proceedings consistent with the foregoing.

DATED June 30, 1977.

/s/ William P. Copple
United States District Judge

FOOTNOTES

[1]The findings do not indicate whether possession was obtained pursuant to a valid security agreement. The parties, however, seem to recognize that it was.

[2]The findings do not indicate what was done with Greer's stock certificate. The parties, however, seem to agree that Stockton and Hing obtained possession of it pursuant to a security agreement.

[3]Stockton and Hing and the McElhanons were all parties to those proceedings.

[4]The McElhanons are lien creditors. See A.R.S. 44-3122(C) (Supp. 1976077). If valid, their lien would be subordinate to any prior perfected security interest, id. 44-3122(A), but only to the extent the security interest secured advances made before the McElhanons became lien creditors or within forty-five days thereafter. Id. 44-3122(D).

[5]Shares of stock are "securities",

A.R.S. 44-3002(A) (Supp. 1976-77), and securities are "instruments". Id. 44-3105 (A)(11). Consequently, section 44-3125(A) applies to shares of stock.

[6]The official UCC comments are a persuasive indicator of legislative intent. See Arizona St. Bd. of Medical Examiners v. Clark, 97 Ariz. 205, 398 P. 2d 908 (1965).